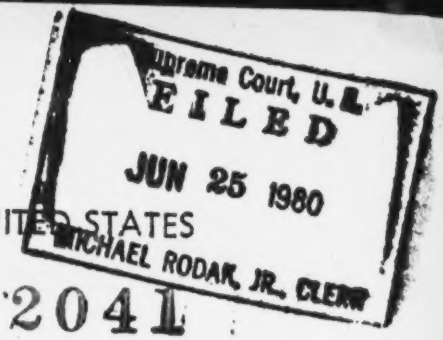

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980
No. 79-2041

EUGENE F. CLAYTON, Appellant

vs.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWN OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF, Appellees.

APPEAL FROM NEW YORK COURT OF APPEALS
JURISDICTIONAL STATEMENT

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Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant, Eugene F. Clayton, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Order entered by the New York Court of Appeals in this case and should exercise such jurisdiction herein.

OPINION BELOW

The Memorandum Opinion of the New York Court of Appeals appears in 49 NY 2d 888 and is included herein as Appendix B-1 (p.A8).

The opinion of the Supreme Court, Appellate Division, Third Department, appears at 73 AD 2d 765 and is included herein as Appendix B-2 (p.A8). A previous opinion of the Court of Appeals appears at 38 NY 2d and is included herein as Appendix B-3. A previous opinion of the Appellate Division appears at 49 AD 2d 343 and is included herein as Appendix B-4.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an appeal to the New York Court of Appeals from an Order of the New York Supreme Court, Appellate Division, Third Department, which upheld a decision of the New York Supreme Court affirming the dismissal of the Appellant tenured teacher by the Respondent School Board. The Order of the New York Court of Appeals was entered on March 27, 1980. Notice of Appeal from said Order was filed on June 25, 1980, in the New York Court of Appeals. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(2). The validity of New York Education Law Section 3020-a is here involved. The full text of that Section is set forth as Appendix A-1 (p. A 1). The full text of that Section as amended in 1977 is set forth as Appendix A-2 (p.A4).

QUESTIONS PRESENTED BY THE APPEAL

Whether the provision of Education Law Section 3020-a(1) allowing the Respondent School District to bring charges against the Appellant for misconduct more than three years old irrationally distinguished the Appellant from teachers in other school districts in violation of Amendment XIV to the United States Constitution assuring equal protection of the law?

Whether the application by the Respondent of Education Law Section 3020-a(1) as it existed prior to its amendment in 1977, allowing the Respondent to consider charges of misconduct more than three years old, after the effective date of said amendment, which restricted school boards to consideration of charges of misconduct less than three years old, distinguished the Appellant from all other teachers charged with misconduct in violation of Amendment XIV to the United States Constitution?

Whether the application by the Respondent of Education Law Section 3020-a(4) as it existed prior to its amendment in 1977, providing that recommendations of a hearing panel were advisory only, after the effective date of said amendment, which provided that recommendations of such panels were mandatory, unlawfully discriminated against the Appellant in violation of Amendment XIV to the United States Constitution, where the hearing panel in this case recommended against dismissal?

Whether the Respondent School Board's consideration of the Appellant's letter to a local newspaper criticizing a member of the School Board in determining to dismiss the Appellant constituted a violation of the Appellant's freedom of expression as provided by the First Amendment to the United States Constitution?

Whether the actions of a member of the Respondent School Board in investigating the Appellant's alleged mis-

conduct, bringing charges based on said conduct before the School Board, and voting as a member of the School Board to dismiss the Appellant, created an improperly high probability of bias which resulted in a denial of the Appellant's due process rights as protected by Amendments V and XIV of the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

Eugene F. Clayton, appellant herein, is a citizen of the United States; and up until the action of the appellee Board of Education which is described below, was a full time, tenured teacher in a public school system. In late 1973, the Vice President of the appellee Board of Education, Gordon L. Pratt, circulated a letter to the other members of the Board of Education appointing himself a "committee of one" to initiate a "crusade" against teachers in the School District who "abuse children." He also wrote a letter to the editor of the local daily newspaper, which was published, expresing the viewpoint that teachers are often guilty of abusing children. The appellant Clayton wrote a letter to the editor in reply; in which he criticized Mr. Pratt's conclusions and pointed out that in many instances, unruly children "abuse" teachers.

After Mr. Clayton's letter was published, Mr. Pratt examined the teacher's personnel file at the School District; and therein found a report of an incident that had occurred over four years earlier (October, 1969) involving Mr. Clayton and a student by the name of Henry Hawley. He then made inquiries of school administrators about Mr. Clayton; and in February, 1974, he formally "charged" the teacher with "insubordination and conduct unbecoming a teacher." The Board of Education met in executive session on February 28, 1974, and by a majority vote--among whom was Mr. Pratt-- determined that "probable cause" existed for preferring charges against Mr. Clayton.

The teacher was served with three written charges. Charge I alleged that he was guilty of using excessive force with students; Charge II alleged that he had been insubordinate in failing to keep adequate lesson plans and also in his dealings with the Superintendent of Schools in connection with the letter to the editor which he had written; and Charge III alleged that he had engaged in conduct "unbecoming a teacher", based on the allegations in Charges I and II.

Charge I referred to two incidents: first, the 1969 difficulty with student Henry Hawley in which, after Hawley had disobeyed and defied the appelant, a scuffle broke out in the class room with both the teacher and the student striking one another; and second, a minor incident in December 1973 when the appellant had detained a high school student running from the building by grabbing the arm of his coat. Charge II referred to lesson plans, but the Court of Appeals has deleted that accusation from the case, and thus it will not be referred to again. Charge II also referred to the letter to the editor written by Mr. Clayton and charged that the letter was "irresponsible and for the purpose of inflaming.... discussion...."

Pursuant to New York State Education Law 3020-a, as it then stood, a tenure hearing panel was convened and took testimony on the charges. The panel unanimously dismissed all of the charges against Mr. Clayton and recommended his immediate reinstatement. The appellee Board of Education then considered the matter, rejected the tenure hearing panel's findings and recommendations, affirmed the charges against the teacher, and dismissed him.

Mr. Clayton then commenced a proceeding under Article 78 of the New York State Civil Practice Law and Rules for judicial review of the Board's action. He argued that his statutory, common law, and Constitutional rights had been violated. The New York State Supreme Court, Appellate Division, agreed; and remitted to the Board of Education with directions to reinstate Mr. Clayton with appropriate back salary. In the course of its decision (49 AD2d 343; 375 NYS 2d 169) the Appellate Division noted that the charge relating to the letter to the editor, if relied upon by the Board of Education, would constitute an attempt to abridge the teacher s freedom of speech. Considering the charge of using excessive force with students, the Court found that the 1973 incident referred to was insignificant and, on its face, could not be "conduct unbecoming a teacher"; and that the 1969 incident could

not be considered by the Board of Education for two reasons: first, that the Board was estopped by the concept of laches from considering such a stale incident; and second, that it would be discriminatory to allow a Board of Education to base a charge on an incident more than three years old when the state statute contained a three year statute of limitation applicable to City School Districts in similar matters. Finding no basis in reason for the difference in treatment between teachers in City School Districts and those in other categories of school districts (such as Mr. Clayton), the Court struck that charge.

Subsequently, the Court of Appeals modified the Appellate Divisions Order by reinstating all of the charges except those related to the lesson plan incident. The Court simply stated that there was "substantial evidence" for the charges brought and remanded to the Board for an appropriate penalty now that the lesson plan charge was deleted. The Court of Appeals did not refer to the First Amendment problem in the case (addressed by the Appellate Division), nor did it mention the disparity of treatment to different teachers apparently allowed by the statute.

Subsequently, the Board of Education, upon remittitur from the Court of Appeals reconsidered the charges (deleting the lesson plan incident) and once again dismissed the appellee. Once again, Mr. Pratt voted to dismiss. Between the time of the Court of Appeals decision and the subsequent action by the Board of Education, significant amendments to Education Law 3020-a were enacted by the New York State Legislature. These amendments became effective on April 15, 1977. With respect to this litigation, the amendments of special importance include the change of the statute of limitations relating to incidents which can be the basis of charges against a tenured teacher from five years to three years in districts such as the appellant district (to be consistent with City School Districts). Also, as of the effective date of the

amendments, the Board of Education was required to implement the recommendation of the tenure hearing panel (instead of the panel's recommendations being advisory only).

The final action taken by the Board of Education in dismissing the appellee took place on April 28, 1977, or approximately two weeks after the effective date of the statutory changes. Once again the Board considered the stale 1969 incident and also ignored the tenure hearing panel's recommendations. Mr. Clayton then commenced a new Article 78 proceeding, seeking judicial review of the Board's final determination on a variety of grounds, some Constitutional in nature. The Appellate Division and the Court of Appeals have refused to consider the Constitutional questions presented; making this appeal necessary.

THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The appellee was a full-time, tenured employee of a public school system at the time of his suspension and ultimate dismissal. As such, he had property and liberty rights in his employment. The nature of the charges against him, the method of reviewing those charges by the Board of Education, the application of the State's statute with respect to this case, and the specific language of the State's statutes all denied to the appellee his Constitutional rights.

a. The statutes applied to the appellee denied to him equal protection under the law.

At the time the charges against the appellee were originally brought the statute applicable to the appellant school district allowed charges to be based on incidents up to five years old; whereas the statute applicable to City school districts provided for a statute of limitations of three years. There is no rational basis for this disparity; and the classification is arbitrary, capricious and unfair; and as such, denies equal protection.

Moreover, another change in the statute which became effective prior to the Board's final determination made the recommendation of the tenure hearing panel mandatory upon the Board of Education, rather than advisory. Despite the change in the statute, the appelant Board ignored the panel's findings and recommendations entirely. Hence the appellee was treated by a public body differently than the statute dictated for tenured teachers and this arbitrary differentiation constitutes a denial of equal protection under the law.

b. Dismissing a tenured teacher, at least in part, because he writes a letter to the editor, is in violation of the First Amendment.

One of the charges against the petitioner is that he was insubordinate and guilty of conduct unbecoming of a teacher by virtue of the fact that he wrote a letter to the editor which disagreed with the conclusion of a previously published letter to the editor by the Vice President of the School Board. The bringing of any such charge is a crude attempt to abridge the petitioner's freedom of speech; and since the charge was utilized throughout the proceeding, the petitioner's First Amendment rights have been violated. Pickering v. Board of Education, 391 U.S. 563; Matter of Puentes v. Board of Education, 24 NY2d 996.

c. The participation of the Vice President of the Board of Education in such a way that he first brought the charges, then voted to find "probable cause" for the charges, then voted to ignore the tenure hearing panel's findings and dismiss the appellee on two separate occasions, constitutes--in the sum--a violation of the appellee's right to due process of law.

This entire sorry affair began because Mr. Clayton wrote a letter to the editor in which he argued that students' abuse of teachers was a greater problem in public schools than the reverse. This letter was written in response to a previously published letter from the Vice President of the Board of Education arguing the opposite premise. After reading this letter, the Vice President of

the Board then commenced a vendetta against the appellee, which consisted of scrutinizing his personnel file, asking administrators for further information about him, manufacturing charges against him, and taking every other action he could to see that the appellee was dismissed. Through this entire process, Mr. Pratt served as investigator, prosecutor, judge and jury of the appellee. His vigorous investigation of the petitioner s personnel record and his support for the Board's prosecution of these charges coming, as it did, after the teacher had expressed his own thoughts in a letter to the editor suggests a "probability of actual bias that is too high to be constitutionally tolerated." Withrow v. Larkin, 421 U.S. 35,47. The participation of Mr. Pratt at every stage of the process in the influential position as Vice President of the Board tainted that process and violated the appellee's right to due process of law. Mayberry v. Pennsylvania, 400 U.S. 455; Taylor v. Hayes, 418 U.S. 488; of Amos v. Board of Education, 54 AD 2d 297, aff d. 43 NY 2d 706; Matter of Root v. Board of Education, 59 AD 2d 328.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court substantial and important federal questions which require plenary consideration.

APPENDIX A - 1

3020 - a. Hearing procedures and penalties

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee isnnormally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Dispositon of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desires a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board

shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within five days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within fifteen days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such

hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within five days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

APPENDIX A-2

§ 3020-a. Hearing procedures and penalties (as amended)

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section ninety-j of this law, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the

charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk or secretary of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk or secretary of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organi-

zations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members except the chairman of the panel shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member. The chairman of the panel shall be paid the normal and customary fee paid to him for services as an arbiter under the auspices of the American Arbitration Association.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose and from a list supplied by the American Arbitration Association: one member shall be selected by the employee, and one member shall be selected by the employing board from the list maintained by the commissioner, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education, from the list supplied by the American Arbitration Association. Such third member shall be chairman of the panel.

Each such hearing shall be conducted by the chairman of the panel and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each

such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee and the board of education involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Either the employee or the employing board may review the findings of the hearing panel either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

6. Notwithstanding any other provision of law to the contrary, a hearing panel member who is employed by a public school district or board of cooperative educational services shall be released from duty by such district or board for such period necessary to carry out the responsibilities of such panel member. Nothing contained in this subdivision shall be construed to diminish or impair any benefits to which such hearing panel member or his legal representative or beneficiaries would be otherwise entitled had such panel member not been released from duty in accordance with the provisions of this subdivision,

provided, however, that such district or board may require such panel member to reimburse such district or board an amount equal to the daily compensation otherwise payable pursuant to this section.

APPENDIX B-1

In the MATTER OF EUGENE F. CLAYTON, Appellant, v. BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, et al., Respondents.

Decided March 27, 1980

Reported below, 73 AD2d 765.

Appeal dismissed, without costs, by the Court of Appeals sua sponte, upon the ground that no substantial constitutional question is directly involved (CPLR 5601, subd [b], par 1).

APPENDIX B-2

In the Matter of EUGENE F. CLAYTON, Appellant, v. BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL et al., Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Zeller, J.), entered June 22, 1978 in Broome County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to transfer the proceeding to the Appellate Division, and to vacate respondent's determination that petitioner be dismissed from his position as a tenured school teacher.

On February 19, 1974, petitioner, a tenured eighth

grade music teacher, was charged with insubordination, use of excessive force upon students, and conduct unbecoming a teacher. Effective February 28, 1974, he was suspended without pay. Thereafter, pursuant to section 3020-a of the Education Law, a hearing was held as a result of which the hearing panel recommended that the charges be dismissed and that petitioner be reinstated. On August 8, 1974, the Board of Education refused to accept the panel's recommendation, found petitioner guilty of the three charges and dismissed him as of the original suspension date.

This is the third occasion the dismissal of petitioner has been before this court. The first time was a constitutional attack on certain administrative regulations (8NYCRR 82.10, 82.11) which this court turned down in Hodgkins v. Central School Dist. No. 1 (48 AD 2d 302). Thereafter, on transfer, this court annulled the determination of the Board of Education for lack of substantial evidence and directed the reinstatement of petitioner (Matter of Clayton v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Conklin, Binghamton, Kirkwood & Vestal, 49 AD 2d 343, revd. 41 NY 2d 966). The Court of Appeals, in reversing, held that substantial evidence supported the findings of the Board of Education and that the board's determination should be reinstated with the exception of one charge. The Court of Appeals did not reinstate the penalty of dismissal, but remitted the matter to the Supreme Court, directing remand to the Board of Education for imposition of an appropriate penalty. On May 4, 1977, the board voted to dismiss petitioner, The instant article 78 proceeding was commenced to review that determination.

We do not find that imposition of the penalty of dismissal is so shocking and excessive in the existing circumstances that it should be set aside. Judicial review of the penalty inflicted in a disciplinary proceeding is a narrow one (Matter of Pell v. Board of Educ., 34 NY 2d

222). In the instant case, the Court of Appeals has found substantial evidence that, despite the warnings of superiors, petitioner used excessive force on students, committed acts of insubordination and engaged in conduct unbecoming a teacher.

Petitioner's other contentions relate to matters previously litigated and, by virtue of the Court of Appeals' decision, are now foreclosed by the rule of the law of the case.

Judgment affirmed, without costs.

APPENDIX B-3

In the Matter of EUGENE F. CLAYTON, Respondent, v. BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, Appellant.

Submitted March 22, 1976; decided April 1, 1976

Reported below, 49 AD2d 343.

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 24, 1975, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in Broome County), (1) annulled a determination of the respondent board of education dismissing petitioner from his position as a tenured teacher under section 3020-a of the Education Law, and (2) remitted the matter to the board with directions to reinstate petitioner with appropriate back salary. By order entered February 18, 1976 said Appellate Division denied respondent's motion for leave to appeal to

the Court of Appeals, and on March 9, 1976 petitioner served a copy of that order by mail on respondent. On March 8, 1976 respondent filed its notice of appeal to the Court of Appeals. In support of the motion to dismiss petitioner contended that respondent's appeal was untimely and that no appeal lay as of right under CPLR 5601.

Motion denied.

In the Matter of EUGENE F. CLAYTON, Petitioner, v BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, Respondent.

Third Department, November 13, 1975

Per Curiam. On February 20, 1974, the respondent was given notice of charges against petitioner for insubordination and conduct unbecoming a teacher, based upon physical abuse of students. On February 28, 1974, the respondent found probable cause for the charges and issued a written statement setting forth in detail three separate charges.

The petitioner (a tenured eighth grade music teacher) was charged with using excessive physical force on students, insubordination and conduct unbecoming a teacher because on October 21, 1969 and on December 10, 1973 he applied physical force on students despite specific warnings from his building principal not to hit or otherwise physically discipline students. He was further charged with insubordination and conduct unbecoming a teacher because he wrote a letter to a newspaper which it published and thereafter delayed in answering certain questions of the Superintendent of Schools about the letter, and also because he failed to prepare "permanent lesson plans".

The matter was fully submitted to a hearing panel pursuant to section 3020-a of the Education Law (all statutory references hereinafter are to the Education Law) and the panel specifically found a failure to prove excessive use of force; that the October 21, 1969 incident should be barred by laches; that the administration did not appear to actually require teachers to prepare lesson plans and that the petitioner prepared the same after being specifically directed to do so; that the October 21, 1969 incident might have been conduct unbecoming a teacher, but there was laches in pursuing it and at the time it happened no one thought it very serious; that all charges and specifications should be dismissed. The hearing panel's decision or report contains no factual findings which would be related to credibility and makes no direct reference to the letter to the newspaper and the delay in responding to a superior in regard thereto.

The board in a decision dated August 8, 1974 referred to the transcript of the record and the hearing panel's report and

found the petitioner guilty of all charges upon findings that all of the factual specifications were established. In its decision, the board expressly declined to apply laches to the October 21, 1969 incident upon the ground that the Legislature had specifically provided for a period of five years within which to bring charges pursuant to section 3020-a.

The petitioner raises many issues upon this proceeding. His contentions as to the unconstitutionality of a suspension of duties prior to a hearing and as to the effectiveness of the rules and regulations of the Commissioner of Education relating to the board decision herein (8 NYCRR 82.10 [h], 82.11) were fully considered in his prior appeal to this court *(Hodgkins v Central School Dist. No. 1,* 48 AD2d 302) and will not now be considered again. (See *Schwartz v Public Administrator of County of Bronx,* 24 NY2d 65.)

Petitioner's contention that upon this record the respondent could not impose punishment upon charge number one (excessive use of force) is correct. Subdivision 2 of section 3012 controls in this case as to the causes for removal and excessive force is not therein listed. Assuming that by virtue of the mention of charges based upon a crime in subdivision 1 of section 3020-a excessive force might be an allegation of a crime and thus a valid independent charge *(Fordum v Board of Regents of State of N. Y.,* 491 F2d 1281), the record is devoid of substantial evidence that the petitioner committed such a crime. (Cf. Penal Law, § 35.10, subd [1].) However, that does not mean that charge 1 and its specifications could not be relied upon by the respondent to establish the charges of insubordination and conduct unbecoming a teacher.

The respondent had established a policy in regard to discipline which as follows was in effect at the relevant times herein: "It is the Teacher's right and duty to discipline students. The Teacher may use corporal punishment for the purpose of restraining and correcting pupils the same as a parent or a guardian. Corporal punishment must be reasonable in manner and moderate in degree." It was proven that on October 21, 1969 the petitioner had a student in his class who was disruptive. The petitioner administered the punishment of standing in a corner during class and at the conclusion of class as petitioner was attempting to remonstrate with him, the boy was insubordinate. In response to the insubordination, the teacher slapped the boy with his fingers and a scuffle ensued which at one point had the petitioner hitting the boy

on his back with his fists. The petitioner testified that following the slap by him, the boy hit him in the chest about three times and that his actions thereafter were to subdue the boy and keep the boy from injuring him further.

The respondent offered as evidence a written memorandum by the petitioner's building principal which recited that the boy became belligerent whereupon the petitioner forcefully caused the boy to fall to the floor and that the petitioner had not denied the charge. The principal testified that he could "not recall" whether or not the petitioner had told him at the time that the boy had hit him with his fist prior to the petitioner's subsequent fighting. Lastly, it should be noted that the petitioner testified the boy was about five feet and nine inches tall and weighed about 210 pounds.

The record establishes that the administration had advised teachers generally by way of a teacher's handbook that they should not apply corporal punishment to students but instead should refer such needy students to administration officers or guidance officers for discipline. However, it was conceded at the hearing that the handbook had not been approved by the respondent and, further, it was admitted that the book and its instruction on discipline were advisory only.

The record also establishes that in 1963 and 1967 the building principal had specifically instructed the petitioner that he was not to hit students. Following the 1969 incident the petitioner was again given such an instruction. The record, however, contains no evidence that the respondent had ever delegated authority to the principal to revoke its specific policy directives as quoted hereinabove which grant the right of corporal punishment to teachers and make it a duty of teachers to discipline students.

Upon the present record, the teacher's handbook and the specific direction of the petitioner's principal were not established as valid directives, and the invalidity thereof is demonstrated by the fact that the administrative people never charged the petitioner with insubordination because of his physical contact with students.

Accordingly, the board's finding that this specification (No. 3 of Charge 1) constituted guilt of insubordination as charged in Charge No. 2 is not supported by substantial evidence. The incident of 1969 will be further considered herein as to conduct unbecoming a teacher.

Specification 6 of Charge No. 1 and as incorporated in the

charge of insubordination and conduct unbecoming a teacher relates to a physical contact between the petitioner and a student on December 10, 1973. A member of the guidance office staff testified that on the said date he observed the petitioner chasing a student in an open area and, as he was about 10 feet from them, the petitioner caught the student by the arm and kept him from pulling away. From what he saw, the petitioner was simply detaining the boy. At his request, the petitioner released the boy and the boy then accompanied the guidance officer to his office. While the record contains some slight inference that without the guidance officer's intervention, the petitioner *might* have been going to strike the boy, there is not a scintilla of probative evidence to that effect. The sole evidence in this record is that the boy had disobeyed an instruction of the petitioner and was trying to escape detention when the petitioner apprehended him. The respondent's finding that this incident (Specification No. 6 of Charge No. 1) was either the hitting or striking of a student or insubordination is without any support of substantial evidence. This incident will be further considered herein as to conduct unbecoming a teacher.

Specification No. 7 of Charge No. 2 recites that by a letter of October 27, 1969 the petitioner was instructed to prepare "permanent lesson plans for a substitute" and on this basis he has been found guilty of insubordination and conduct unbecoming a teacher. The petitioner's building principal testified that on October 27, 1969 he instructed the petitioner to prepare a permanent lesson plan. He then testified that the policy was for every teacher to have a "weekly" lesson plan. On April 18, 1973 the petitioner told the principal that he had not been preparing "weekly" lesson plans for three years, but that he would do so from then on. The principal explained that there is a difference between a "permanent" lesson plan and weekly or daily plans. Then the principal conceded that when he questioned petitioner in 1973, it was not as to "permanent" lesson plans and that the petitioner might well have had such a plan.

The petitioner testified that although he had not always prepared weekly or daily lesson plans prior to the direction of his principal in April of 1973, he had at all times maintained a permanent lesson plan since the 1969 direction of his principal. The hearing panel found that the record did not establish that the defendant failed to carry out requests by his

principal to prepare lesson plans. The respondent found he was guilty as described in Specification No. 7. The record establishes that the petitioner had complied with the 1968 order of his principal and the additional matter in the record relating to weekly or daily lesson plans was not encompassed within the charges and cannot be utilized as a basis for action in this proceeding. The record contains no substantive evidence which would support a finding of insubordination in regard to lesson plans and this specification could not rationally support a conclusion of conduct unbecoming a teacher.

The remaining Specification No. 8 in these charges relates to a letter written by the petitioner to a local newspaper and which was printed therein. The letter was published November 29, 1973 and criticized a Mr. Gordon Pratt (the vice-president of the respondent and the same man that initiated charges against the petitioner) in regard to allegations that children were being abused in public schools and went on to state that, in fact, pupils in the schools were abusing teachers. Specification No. 8 goes on to recite that the Superintendent of Schools requested information in a letter dated December 7, 1973 as to specific instances of abuse of teachers by students. The record establishes that in the December 7, 1973 letter the information was not requested to be furnished by any certain time. On January 10, 1974 the Superintendent of Schools wrote another letter to petitioner wherein he concluded that since the petitioner had not yet responded to his request for information, the original allegation of abuse of teachers by students was irresponsible. The petitioner, on January 12, 1974, responded and gave details of recent examples of abuse to himself by students.

Specification No 8 is exceedingly vague because it expressly recites that it is not intended to charge the petitioner with any "wrong doing" as to the writing or publishing of the letter. The Superintendent of Schools testified that he was merely attempting to investigate instances of abuse by students so he could correct the situation as was his duty. He then conceded that the petitioner did furnish information as requested, and that he did not request any further details. As a matter of fact, the record does not contain substantial evidence which would sustain the board's finding that the proof as to Specification No. 8 constituted proof of insubordination or conduct unbecoming a teacher. As a matter of law, this particular specification would constitute an indirect at-

tempt to abridge the petitioner's freedom of speech by the respondent. (See *Matter of Fuentes v Board of Educ. of Union Free School Dist. No. 21 of Town of Bethpage*, 24 NY2d 996, 998, 999.) From the testimony of the Superintendent of Schools it is apparent that he was already aware that the school files contained many instances of abusive conduct by pupils toward teachers.

The remaining issue is whether or not the record contains substantial evidence to support the finding of the board that the petitioner engaged in conduct unbecoming a teacher.

As noted hereinabove, the record does not contain any proof that the petitioner's conduct in regard to the letter published on November 29, 1973 and the subsequent request of the Superintendent of Schools would constitute insubordination. The record is devoid of any facts which would reasonably infer or suggest that his conduct in regard to the information requested by the Superintendent of Schools was a form of misconduct. The specification itself recited that the respondent was not charging any wrongdoing in regard to the fact that the petitioner actually wrote the letter published on November 29, 1973. Accordingly, the respondent's finding that this specification would support a finding of misconduct is erroneous.

As noted hereinabove, Specification No. 7 which related to the filing or preparation of lesson plans was not established in the record as being any form of insubordination. The record does contain some evidence which was not charged in the specifications which would indicate that it was the general duty of the petitioner and all teachers to prepare daily or weekly lesson plans. While that evidence might be minimal proof of some neglect of duty, it does not in any way constitute proof of misconduct, and the respondent erred in finding that Specification No. 7 would support a conclusion of misconduct.

Specification No. 6 of the charges, as discussed hereinabove, related to the fact that the petitioner chased and physically restrained a student who was apparently seeking to avoid a detention. The record does not disclose any facts which would reasonably infer that the chase or apprehension was anything other than the duty of the petitioner or that, under the circumstances then prevailing, it would be misconduct. Accordingly, the board erred in finding that this particular specification would support a finding of misconduct.

Specification No. 3 which relates to the use of force by the petitioner upon a student on October 21, 1969 is fully discussed hereinabove. While the record lacked substantial evidence which would establish that the particular conduct by the petitioner was a crime or constituted insubordination, it could be considered as conduct unbecoming a teacher because it had obviously developed into a situation resembling a classroom brawl. Nevertheless, the record does not establish that the petitioner did not have reason to initially engage in the fisticuffs in order to protect himself. While it appears that the respondent rejected, upon credibility, the testimony of the petitioner as to the necessity for self-defense, the only remaining evidence is that the fisticuffs started because of the belligerence of the student. Upon the present record, there is circumstantial evidence that the force applied by the petitioner was excessive, however, there is equally strong circumstantial evidence that the application of force by the petitioner was entirely necessary. It is notable that the record does not establish that the administration considered the 1969 incident was of such a nature as to constitute possible misconduct at the time it occurred. As noted by the hearing panel, the 1969 incident was quite stale as of the time these charges were preferred and, in fact, had occurred well over four years before these charges were instituted. The board expressly rejected the conclusion of the hearing panel that the 1969 incident was barred by laches and concluded that pursuant to subdivision 1 of section 3020-a incidents which had occurred within five years of the institution of charges could be relied upon to support a finding of misconduct.

Subdivision 1 of section 3020-a as applicable to the question of laches provides in part as follows: "Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed." Subdivision 8 of section 2573, as excepted from the five-year provision, relates to charges against teachers in city school districts and provides that charges of misconduct shall not be brought more than *three* years after the occurrence of the misconduct except in cases of a crime. While the present proceedings are brought pursuant to section 3012 which governs this particular school district and accordingly section 2573 is inapplicable,

it is evident that a construction of the time limitation contained in subdivision 1 of section 3020-a which would make the three-year limitation available only to teachers in city school districts is discriminatory. The petitioner throughout these proceedings has not objected to the 1969 incident as being excluded as a matter of limitations within the Education Law, nevertheless, it has been persistently contended on his behalf that as a matter of "laches" (staleness) the incident should be excluded.

There is no apparent reason for limiting charges of teachers of city school districts as to a three-year period and not imposing the same limitation in regard to teachers of large central school districts. Subdivision 8 of section 2573 expressly relates itself to charges brought pursuant to that section but the pertinent language of subdivision 1 of section 3020-a is not upon its face concerned with any particular section pursuant to which charges might be filed and is simply a time limitation. Considering the penal nature of these proceedings and the statutes which permit the revocation of tenure and discharge of teachers for specified reasons, the limiting language of section 3020-a should be strictly construed. (McKinney's Cons Laws of NY, Book 1, Statutes, § 271.) Given such a strict construction, a limitation of time as affected by the importation in subdivision 1 of section 3020-a of subdivision 8 of section 2573 is, in fact, three years from the date the alleged incident occurred except when the charge constituted a crime when committed. Under this construction, the board's rejection of the petitioner's claim of laches or staleness was erroneous as a matter of law and the 1969 incident may not be considered substantial evidence of conduct unbecoming a teacher.

Since the record lacks substantial evidence to support a finding that any of the charges against the petitioner were sustained, the remainder of the petitioner's contentions upon this proceeding are not reached or considered.

The determination should be annulled, with costs, and the matter remitted to respondent with directions to reinstate petitioner in his position as a teacher with appropriate back salary to the date of reinstatement less a credit to respondent for all earnings which petitioner may have had from other employment during his period of suspension.

HERLIHY, P. J., KANE, MAIN and LARKIN, JJ., concur; GREENBLOTT, J., not taking part.

Best Available Copy. See prior page A-19 last paragraph.

Determination annulled, with costs, and matter remitted to respondent with directions to reinstate petitioner in his position as a teacher with appropriate back salary to the date of reinstatement less a credit to respondent for all earnings which petitioner may have had from other employment during his period of suspension.

STATE OF NEW YORK
COURT OF APPEALS

APPENDIX C

In the Matter of EUGENE F. CLAYTON,
Appellant,

vs.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWN OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF,
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Eugene F. Clayton, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final decision of the New York Court of Appeals dismissing an appeal from a decision of the New York Supreme Court, Appellate Division, Third Department, entered the 8th day of January, 1980. The decision appealed from was entered on the 27th day of March, 1980.

This appeal is taken pursuant to Title 28, United States Code, section 1257 (2).

Dated: June 25, 1980.

TO: Shaw, Esworthy,
O'Brien & Crowley
123 Front Street
Binghamton, NY 13905
Att: Frank Shaw, Esq.

PAUL E. KLEIN, ESQ.
ASWAD & INGRAHAM,
of counsel
Office and P.O. Address
46 Front Street
Binghamton, NY 13905

APPENDIX D

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of EUGENE F. CLAYTON,
Appellant,

vs.

AFFIDAVIT

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWN OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF,

Respondents.

STATE OF NEW YORK)
COUNTY OF BROOME) ss.:

KURT D. SCHRADER, being duly sworn, deposes and says, that he is not a party to this action, is over 18 years of age and resides at R.D. #1, Windsor, New York. That on the 25th day of June, 1980, Deponent served three (3) copies of the within Jurisdictional Statement on Frank Shaw, Attorney for the Respondents herein, by delivering the same to the offices of Shaw, Esworthy, O'Brien & Crowley, 123 Front Street, Binghamton, New York.

/s/ Kurt D. Schrader
Kurt D. Schrader

Subscribed and sworn to
before me this 25th day
of June, 1980.

/s/ Charles O. Ingraham
Notary Public

Supreme Court, U.S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

79-2041

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

EUGENE F. CLAYTON, Appellant

vs.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWN OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF, Appellees.

APPEAL FROM NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

SUPPLEMENTAL APPENDIX

PAUL E. KLEIN, ESQ.

ASWAD & INGRAHAM
Attorneys of Counsel
46 Front Street
Binghamton, New York 13905

In the Matter of EUGENE F. CLAYTON, Petitioner, v. BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, Respondent.

Third Department, November 13, 1975.

Per Curiam. On February 20, 1974, the respondent was given notice of charges against petitioner for insubordination and conduct unbecoming a teacher, based upon physical abuse of students. On February 28, 1974, the respondent found probable cause for the charges and issued a written statement setting forth in detail three separate charges.

The petitioner (a tenured eighth grade music teacher) was charged with using excessive physical force on students, insubordination and conduct unbecoming a teacher because on October 21, 1969 and on December 10, 1973 he applied physical force on students despite specific warnings from his building principal not to hit or otherwise physically discipline students. He was further charged with insubordination and conduct unbecoming a teacher because he wrote a letter to a newspaper which it published and thereafter delayed in answering certain questions of the Superintendent of Schools about the letter, and also because he failed to prepare "permanent lesson plans".

The matter was fully submitted to a hearing panel pursuant to section 3020-a of the Education Law (all statutory references hereinafter are to the Education Law) and the panel specifically found a failure to prove excessive use of force; that the October 21, 1969 incident should be barred by laches; that the administration did not appear to actually require teachers to prepare lesson plans and that the petitioner prepared the same after being specifically directed to do so; that the October 21, 1969

incident might have been conduct unbecoming a teacher, but there was laches in pursuing it and at the time it happened no one thought it very serious; that all charges and specifications should be dismissed. The hearing panel's decision or report contains no factual findings which would be related to credibility and makes no direct reference to the letter to the newspaper and the delay in responding to a superior in regard thereto.

The board in a decision dated August 8, 1974 referred to the transcript of the record and the hearing panel's report and found the petitioner guilty of all charges upon findings that all of the factual specifications were established. In its decision, the board expressly declined to apply laches to the October 21, 1969 incident upon the ground that the Legislature had specifically provided for a period of five years within which to bring charges pursuant to section 3020-a.

The petitioner raises many issues upon this proceeding. His contentions as to the unconstitutionality of a suspension of duties prior to a hearing and as to the effectiveness of the rules and regulations of the Commissioner of Education relating to the board decision herein (8 NYCRR 82.10 (h), 82.11) were fully considered in his prior appeal to this court (Hodgkins v. Central School Dist. No. 1, 48 AD2d 302) and will not now be considered again. (See Schwartz v. Public Administrator of County of Bronx, 24 NY2d 65).

Petitioner's contention that upon this record the respondent could not impose punishment upon charge number one (excessive use of force) is correct. Subdivision 2 of section 3012 controls in this case as to the causes for removal and excessive force is not therein listed. Assuming that by virtue of the mention of charges based upon a crime in subdivision 1 of section 3020-a excessive force might be an allegation of a crime and thus a valid independent charge (Fordum v. Board of Regents of State of

N.Y., 491 F2d 1281), the record is devoid of substantial evidence that the petitioner committed such a crime. (Cf. Penal Law, § 35.10, subd (1).) However, that does not mean that charge 1 and its specifications could not be relied upon by the respondent to establish the charges of insubordination and conduct unbecoming a teacher.

The respondent had established a policy in regard to discipline which as follows was in effect at the relevant times herein: "It is the Teacher's right and duty to discipline students. The Teacher may use corporal punishment for the purpose of restraining and correcting pupils the same as a parent or a guardian. Corporal punishment must be reasonable in manner and moderate in degree." It was proven that on October 21, 1969 the petitioner had a student in his class who was disruptive. The petitioner administered the punishment of standing in a corner during class and at the conclusion of class as petitioner was attempting to remonstrate with him, the boy was insubordinate. In response to the insubordination, the teacher slapped the boy with his fingers and a scuffle ensued which at one point had the petitioner hitting the boy on his back with his fists. The petitioner testified that following the slap by him, the boy hit him in the chest about three times and that his actions thereafter were to subdue the boy and keep the boy from injuring him further.

The respondent offered as evidence a written memorandum by the petitioner's building principal which recited that the boy became belligerent whereupon the petitioner forcefully caused the boy to fall to the floor and that the petitioner had not denied the charge. The principal testified that he could "not recall" whether or not the petitioner had told him at the time that the boy had hit him with his fist prior to the petitioner's subsequent fighting. Lastly, it should be noted that the petitioner testified the boy was about five feet and nine inches tall and weighed about 210 pounds.

The record establishes that the administration had advised teachers generally by way of a teacher's handbook that they should not apply corporal punishment to students but instead should refer such needy students to administration officers or guidance officers for discipline. However, it was conceded at the hearing that the handbook had not been approved by the respondent and, further, it was admitted that the book and its instruction on discipline were advisory only.

The record also establishes that in 1963 and 1967 the building principal had specifically instructed the petitioner that he was not to hit students. Following the 1969 incident the petitioner was again given such an instruction. The record, however, contains no evidence that the respondent had ever delegated authority to the principal to revoke its specific policy directives as quoted hereinabove which grant the right of corporal punishment to teachers and make it a duty of teachers to discipline students.

Upon the present record, the teacher's handbook and the specific direction of the petitioner's principal were not established as valid directives, and the invalidity thereof is demonstrated by the fact that the administrative people never charged the petitioner with insubordination becuase of his physical contact with students.

Accordingly, the board's finding that this specification (No. 3 of Charge 1) constituted guilt of insubordination as charged in Charge No. 2 is not supported by substantial evidence. The incident of 1969 will be further considered herein as to conduct unbecoming a teacher.

Specification 6 of Charge No. 1 and as incorporated in the charge of insubordination and conduct unbecoming a teacher relates to a physical contact between the petitioner and a student on December 10, 1973. A member

of the guidance office staff testified that on the said date he observed the petitioner chasing a student in an open area and, as he was about 10 feet from them, the petitioner caught the student by the arm and kept him from pulling away. From what he saw, the petitioner was simply detaining the boy. At his request, the petitioner released the boy and the boy then accompanied the guidance officer to his office. While the record contains some slight inference that without the guidance officer's intervention, the petitioner might have been going to strike the boy, there is not a scintilla of probative evidence to that effect. The sole evidence in this record is that the boy had disobeyed an instruction of the petitioner and was trying to escape detention when the petitioner apprehended him. The respondent's finding that this incident (Specification No. 6 of Charge No. 1) was either the hitting or striking of a student or insubordination is without any support of substantial evidence. This incident will be further considered herein as to conduct unbecoming a teacher.

Specification No. 7 of Charge No. 2 recites that by a letter of October 27, 1969 the petitioner was instructed to prepare "permanent lesson plans for a substitute" and on this basis he has been found guilty of insubordination and conduct unbecoming a teacher. The petitioner's building principal testified that on October 27, 1969 he instructed the petitioner to prepare a permanent lesson plan. He then testified that the policy was for every teacher to have a "weekly" lesson plan. On April 18, 1973 the petitioner told the principal that he had not been preparing "weekly" lesson plans for three years, but that he would do so from then on. The principal explained that there is a difference between a "permanent" lesson plan and weekly or daily plans. Then the principal conceded that when he questioned petitioner in 1973, it was not as to "permanent" lesson plans and that the petitioner might well have had such a plan.

The petitioner testified that although he had not always prepared weekly or daily lesson plans prior to the direction of his principal in April of 1973, he had at all times maintained a permanent lesson plan since the 1969 direction of his principal. The hearing panel found that the record did not establish that the defendant failed to carry out requests by his principal to prepare lesson plans. The respondent found he was guilty as described in Specification No. 7. The record establishes that the petitioner had complied with the 1969 order of his principal and the additional matter in the record relating to weekly or daily lesson plans was not encompassed within the charges and cannot be utilized as a basis for action in this proceeding. The record contains no substantive evidence which would support a finding of insubordination in regard to lesson plans and this specification could not rationally support a conclusion of conduct unbecoming a teacher.

The remaining Specification No. 8 in these charges relates to a letter written by the petitioner to a local newspaper and which was printed therein. The letter was published November 29, 1973 and criticized a Mr. Gordon Pratt (the vice-president of the respondent and the same man that initiated charges against the petitioner) in regard to allegations that children were being abused in public schools and went on to state that, in fact, pupils in the schools were abusing teachers. Specification No. 8 goes on to recite that the Superintendent of Schools requested information in a letter dated December 7, 1973 as to specific instances of abuse of teachers by students. The record establishes that in the December 7, 1973 letter the information was not requested to be furnished by any certain time. On January 10, 1974 the Superintendent of Schools wrote another letter to petitioner wherein he concluded that since the petitioner had not yet responded to his request for information, the original allegation of abuse of teachers by students was irresponsible. The petitioner, on January 12, 1974, responded and gave details of recent

examples of abuse to himself by students.

Specification No. 8 is exceedingly vague because it expressly recites that it is not intended to charge the petitioner with any "wrong doing" as to the writing or publishing of the letter. The Superintendent of Schools testified that he was merely attempting to investigate instances of abuse by students so he could correct the situation as was his duty. He then conceded that the petitioner did furnish information as requested, and that he did not request any further details. As a matter of fact, the record does not contain substantial evidence which would sustain the board's finding that the proof as to Specification No. 8 constituted proof of insubordination or conduct unbecoming a teacher. As a matter of law, this particular specification would constitute an indirect attempt to abridge the petitioner's freedom of speech by the respondent. (See Matter of Puentes v. Board of Educ. of Union Free School Dist. No. 21 of Town of Bethpage, 24 NY2d 996, 998, 999.) From the testimony of the Superintendent of Schools it is apparent that he was already aware that the school files contained many instances of abusive conduct by pupils toward teachers.

The remaining issue is whether or not the record contains substantial evidence to support the finding of the board that the petitioner engaged in conduct unbecoming a teacher.

As noted hereinabove, the record does not contain any proof that the petitioner's conduct in regard to the letter published on November 29, 1973 and the subsequent request of the Superintendent of Schools would constitute insubordination. The record is devoid of any facts which would reasonably infer or suggest that his conduct in regard to the information requested by the Superintendent of Schools was a form of misconduct. The specification itself recited that the respondent was not charging any wrongdoing in regard to the fact that the petitioner actually wrote the letter published on November 29, 1973. Accordingly,

the respondent's finding that this specification would support a finding of misconduct is erroneous.

As noted hereinabove, Specification No. 7 which related to the filing or preparation of lesson plans was not established in the record as being any form of insubordination. The record does contain some evidence which was not charged in the specifications which would indicate that it was the general duty of the petitioner and all teachers to prepare daily or weekly lesson plans. While that evidence might be minimal proof of some neglect of duty, it does not in any way constitute proof of misconduct, and the respondent erred in finding that Specification No. 7 would support a conclusion of misconduct.

Specification No. 6 of the charges, as discussed hereinabove, related to the fact that the petitioner chased and physically restrained a student who was apparently seeking to avoid a detention. The record does not disclose any facts which would reasonably infer that the chase or apprehension was anything other than the duty of the petitioner or that, under the circumstances then prevailing, it would be misconduct. Accordingly, the board erred in finding that this particular specification would support a finding of misconduct.

Specification No. 3 which relates to the use of force by the petitioner upon a student on October 21, 1969 is fully discussed hereinabove. While the record lacked substantial evidence which would establish that the particular conduct by the petitioner was a crime or constituted insubordination, it could be considered as conduct unbecoming a teacher because it had obviously developed into a situation resembling a classroom brawl. Nevertheless, the record does not establish that the petitioner did not have reason to initially engage in the fisticuffs in order to protect himself. While it appears that the respondent rejected, upon credibility, the testimony of the petitioner as to

the necessity for self-defense, the only remaining evidence is that the fisticuffs started because of the belligerence of the student. Upon the present record, there is circumstantial evidence that the force applied by the petitioner was excessive, however, there is equally strong circumstantial evidence that the application of force by the petitioner was entirely necessary. It is notable that the record does not establish that the administration considered the 1969 incident was of such a nature as to constitute possible misconduct at the time it occurred. As noted by the hearing panel, the 1969 incident was quite stale as of the time these charges were preferred and, in fact, had occurred well over four years before these charges were instituted. The board expressly rejected the conclusion of the hearing panel that the 1969 incident was barred by laches and concluded that pursuant to subdivision 1 of section 3020-a incidents which had occurred within five years of the institution of charges could be relied upon to support a finding of misconduct.

Subdivision 1 of section 3020-a as applicable to the question of laches provides in part as follows: "Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed." Subdivision 8 of section 2573, as excepted from the five-year provision, relates to charges against teachers in city school districts and provides that charges of misconduct shall not be brought more than three years after the occurrence of the misconduct except in cases of a crime. While the present proceedings are brought pursuant to section 3012 which governs this particular school district and accordingly section 2573 is inapplicable, it is evident that a construction of the time limitation contained in subdivision 1 of section 3020-a which would make the three-year limitation available only to teachers in city school districts is discriminatory. The petitioner throughout

these proceedings has not objected to the 1969 incident as being excluded as a matter of limitations within the Education Law, nevertheless, it has been persistently contended on his behalf that as a matter of "laches" (staleness) the incident should be excluded.

There is no apparent reason for limiting charges of teachers of city school districts as to a three-year period and not imposing the same limitation in regard to teachers of large central school districts. Subdivision 8 of section 2573 expressly relates itself to charges brought pursuant to that section but the pertinent language of subdivision 1 of section 3020-a is not upon its face concerned with any particular section pursuant to which charges might be filed and is simply a time limitation. Considering the penal nature of these proceedings and the statutes which permit the revocation of tenure and discharge of teachers for specified reasons, the limiting language of section 3020-a should be strictly construed. (McKinney's Cons Laws of NY, Book 1, Statutes, § 271) Given such a strict construction, a limitation of time as affected by the importation in subdivision 1 of section 3020-a of subdivision 8 of section 2573 is, in fact, three years from the date the alleged incident occurred except when the charge constituted a crime when committed. Under this construction, the board's rejection of the petitioner's claim of laches or staleness was erroneous as a matter of law and the 1969 incident may not be considered substantial evidence of conduct unbecoming a teacher.

Since the record lacks substantial evidence to support a finding that any of the charges against the petitioner were sustained, the remainder of the petitioner's contentions upon this proceeding are not reached or considered.

The determination should be annulled, with costs, and the matter remitted to respondent with directions to reinstate petitioner in his position as a teacher with appropriate back

salary to the date of reinstatement less a credit to respondent for all earnings which petitioner may have had from other employment during his period of suspension.

HERLIHY, P.J., KANE, MAIN and LARKIN, JJ., concur; GREENBLOTT, J., not taking part.

Determination annulled, with costs, and matter remitted to respondent with directions to reinstate petitioner in his position as a teacher with appropriate back salary to the date of reinstatement less a credit to respondent for all earnings which petitioner may have had from other employment during his period of suspension.

Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-2041

IN THE

Supreme Court of the United States

October Term, 1980.

EUGENE F. CLAYTON,

Appellant,

vs.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF,

Appellees.

APPEAL FROM NEW YORK COURT OF APPEALS.

MOTION TO DISMISS APPEAL.

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Appendix L-Proof of Service A-31-A-32

TABLE OF AUTHORITIES

NOTE: Several of the cases involving the parties herein have substantially the same title as this action. To avoid lengthy repetition, same will be referred to herein as *"Clayton v. Appellees"* followed by the state citation.

TITLE	Cited herein at Pages
Bott v. BOE, Deposit CSD, 41 NY 2d 265, 392 NYS 2d 274, 360 NE 2d 952 (Feb 8, 1978)	12, 11
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Clayton v. Appellees, NY Supreme Court-Appellate Division, 3d Dept., Dec. 29, 1979, 73 AD 2d 765, 423 NYS 2d 548.	14

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Elmer F. Hodgkins, et al v. CSD No. 1 of the Towns of Conklin, etc. and Ewald B. Nyquist as Commissioner of Education of the State of New York, Intervenor-Respondent, 28 Misc. 2d 91, 355 NYS 2d 932, aff'd 48 AD 2d 302, 308 NYS 2d 891 10

Pell v. Board of Education, et al, NY Ct of Appeals (May 15, 1974) 34 NY 2d 222, 356 NYS 2d 833, 313 NE 2d 321 15

The following is presented in support of Appellees' motion to dismiss the appeal herein.

POINT I

THE HIGHEST COURT OF THE STATE OF NEW YORK WAS NOT IMPRESSED WITH THE SAME ALLEGED CONSTITUTIONAL QUESTIONS RELIED ON IN APPELLANTS' JURISDICTIONAL STATEMENT HEREIN.

In fact the Court of Appeals dismissed Appellant's appeal to it *sua sponte* on the grounds that no substantial constitutional question is directly involved. *Clayton v. Board of Education of CSD No. 1, etc.*, 49 NY 2d 888, 427 NYS2d 992, (Case one)Mar. 27, 1980 (Appellant's Appendix B-1, page A-8).

The Constitution of the State of New York, Article 6, Section 3-a limits the jurisdiction of its highest court, the "Court of Appeals" to the review of questions of law (except where

the Appellate Division below in reversing or modifying finds new facts). (Appendix A, Pg. A-1)

The State's Civil Practice Law and Rules, hereafter "CPLR", in concert with additional constitutional provisions not pertinent here provides two routes by which a litigant may appeal to the Court of Appeals:

I. By permission of either the Appellate Division or the Court of Appeals when the matter is not appealable as of right. CPLR 5602 (a) 1 (i) - Appendix B, Pg. A- 2)

II. "As of right" under CPLR 5601 (a) Where there is a dissent, on a question of law or a reversal . . .; or (b) On "Constitutional Grounds" (i) "...where there is directly involved the constitution of the state or of the United States." (Appendix C, Pg. A- 4)

Appellant was unable to use CPLR 5601 (a) because the Appellate Division unanimously affirmed the decision of the lower court. Further, Appellant chose not to seek permission from either court and his time to do so has expired. CPLR 5513 (b) and 5514 (a) provide additional time for appeals by permission if the Court of Appeals rules that the appeal does not lie "as of right". (Appendix D, Pg. A- 5)

Thus, in a very real sense, Appellant is not appealing to this court from a final decision of the highest state court as required by Title 28 United States Code Section 1257.

In all appeals, Rule 500.2 of the New York Court of Appeals[1] requires a "jurisdictional statement" showing how and why it has jurisdiction of the proposed appeal.

[1] *Appendix E, Pg. A- 6)*

Appellant's jurisdictional statement included almost four pages wherein he set forth the same facts and arguments made to this court in his jurisdictional statement only in more detail and citing many U.S. cases in support of his arguments. This portion of the New York jurisdictional statement is included herein as Appendix F, Pg. A-7 .

In spite of same, the Clerk of the Court of Appeals wrote counsel stating in part

> "The Court may examine its subject matter jurisdiction *sua sponte* with respect to whether a substantial constitutional question is directly involved in the appeal. . ."

The full text of this letter is set forth in Appendix G, Pg. A-14. It gave appellant's counsel ten days to present additional (written) comments justifying the relention of subject matter jurisdiction.

Counsel responded with a two page letter repeating previous arguments

and dwelling at some length on the letter to the editor angles in the case. See Appendix H, Pg. A-16. In reply, counsel for Appellee herein submitted to the New York Court a three page letter pointing out that the alleged "constitutional issues" except refusal of both lower courts to apply the amendments retroactively had been before the Court of Appeals on the first occasion this matter was before it. This letter is reproduced on Appendix I, Pg. A-20.

Shortly thereafter the Court of Appeals *sua sponte* dismissed the appeal

> "...(U)pon the ground that no substantial constitutional question is directly involved." *Clayton*, above.

This court is asked to take judicial notice that the Constitution of the State of New York contains clauses similar to those in the United States Constitution alleged to have been

violated.

It is submitted that the highest court of the State of New York is neither insensitive to civil rights matters nor unlearned with respect to constitutional issues (State or Federal).

On the basis of the foregoing, appellees urge that this appeal should be dismissed on the ground that it does not present a substantial Federal question.

ADDITIONAL FACTS

The Appellant's jurisdictional statement does not give a fully rounded abstract of the facts of this case nor of all the litigation the facts spawned.

Appellee school district had a policy which permitted teachers to physically discipline children but such corporal punishment had to be "reasonable in manner and moderate in degree".

About the same time the scenario of this case began, another teacher in Appellee district yanked a strip of scalp approximately 5 inches long and 1½ inches wide from the head of a young boy. There were other incidents in this and other districts in this area although same are not part of this record. As might be expected, there was public indignation over what seemed to be a rash of incidents of abuse. Part of the case against Appellant was that he persisted in using force on

children in spite of specific instructions not to touch students. The complete charges and specifications are set forth as Appendix J, Pg. A-25.

The scalp tearing incident precipitated a general determination to do something about the whole situation. Mr. Pratt had a perfect right under local law to file charges. Anyone could file preliminary charges but as the statute[1] shows, the full Board of Education (in this case nine persons) had to find probable cause before formal charges could be preferred and the rest of the statutory procedure set in motion. Mr. Pratt filed preliminary charges against both appellant and against the teacher who

[1] *Education Law 3020-a set forth in Appellant's jurisdictional statement at Appendix A-1, Pg. A-1.*

yanked the scalp out of the boy's head. The charges were similar but the only connection between the two teachers charged is that both happened to be music teachers.

Appellant, among other things, was found guilty of engaging in a common brawl with a student in a classroom by straddling the student while pounding his back and neck. Bruises were still visible the next day on the student.

The Board of Education found probable cause and formally charged both teachers. The two teachers then commenced a joint action to restrain the proceedings on the grounds that both the statute itself and newly promulgated regulations of the State Commissioner of Education were unconstitutional. Plaintiffs relied heavily on a Federal District case from the Western District of New York *Kinsella v. Board of Education*, 378 Fed Supp 54.

The State Commissioner of Education intervened; the Appellate Division affirmed the lower court (Supreme Court, Broome County, N.Y.) which held the statute and the new regulations constitutional and further ordered that the statutory proceedings proceed. See *Elmer F. Hodgkins, et al v. Central SD No. 1 of the Towns of Conklin, etc. and Ewald B. Nyquist, as Commissioner of Education of the State of New York, Intervenor-Respondent*, 28 Misc. 2d 355, 355 NYS 2d 932 affirmed 48 AD 2d 302, 368 NYS 2d 891.

Appeal to the Court of Appeals from this decision did not lie as of right because it was a unanimous affirmance. No attempt was made to appeal to the Court of Appeals on constitutional grounds nor by permission; nor was any appeal to this court attempted although some points

raised herein are identical to issues argued in that action.

The statutory proceedings did proceed as outlined in Appellant's jurisdictional statement. The Board of Education found both teachers guilty as charged and set the penalty at dismissal. Each teacher then commenced separate "Article 78" proceedings to set aside his dismissal.

One of the main issues in both cases was whether or not the charge of "using excessive physical force" was a proper charge under the State's tenure law (Ed.L. 3012(2) (set forth at Appendix K, Pg. A-30). Use of excessive physical force was not specifically enumerated.[1]

It happened that a very similar case *Bott v. BOE Deposit CSD*, 41 NY 2d 265,

[1] *Appellant was charged with insubordination, conduct unbecoming a teacher as well as use of excessive force.*

392 NYS 2d 274, 360 NE 2d 952 (Feb. 8, 1978) raised the same question of whether use of excessive force is a valid charge in tenure-breaking proceedings under State law. The Court of Appeals announced its decision in *Bott* about a week before Appellant's case and the scalp tearing case were argued before it. *Bott* held, in a long and detailed opinion, that excessive or otherwise improper use of physical force against pupils comes within the scope of the statute. (Ed.L. 3012)

In Appellant's case[1] the court merely referred to *Bott* and found the records in both cases satisfied the "substantial evidence" requirements for such administrative proceedings, sustained all

[1] *Clayton v. BOE CSD No. 1 of the Towns of Conklin, etc., 41 NY 2d 966, (memorandum decision) 394 NYS 2d 882, 363 NE 2d 588 (Mar. 31, 1977)*

charges in the scalp tearing case as well as the penalty of dismissal. This in spite of the fact that the hearing panel had recommended reinstatement.

However, as the jurisdictional statement shows, the Court of Appeals did reject one minor specification of the general charges of insubordination and conduct unbecoming a teacher against the Appellant regarding lesson plans which necessitated remitting the case to the school board for reconsideration of a penalty. The Board re-read the record and again voted dismissal.

Appellant then commenced "Chapter Three", i.e. another "Article 78" proceeding in which he raised the same arguments including the role of Mr. Pratt. He raised the same due process claims plus new constitutional claims revolving around

the 1977 amendments to Ed.L. 3020-a which went into effect 13 days before Appellee Board voted a second time to dismiss Appellant for (1) using excessive physical force on children; (2) for insubordination and (3) for conduct unbecoming a teacher.

Appellee's determination of dismissal was sustained by the Supreme Court for this County which summarily rejected the constitutional and bias arguments and found the penalty of dismissal appropriate. The Appellate Division affirmed unanimously. *Clayton v. Board of Education of CSD No. 1 of Towns of Conklin, etc.*, (AppDiv Dec 29, 1979) 73 AD 2d 765, 423 NYS 2d 548 (lower court decision not reported) Appellant's attempts to appeal to the Court of Appeals have been detailed in Point I hereof above.

The only real question in Appellant's "Chapter Three" appeal was

whether or not the punishment, in view of the facts found, shocked the conscience of the court. *Pell v. Board of Education, et al*, 34 NY 2d 222, 356 NYS 2d 833, 313 NE 2d 321.

Appellee contends that if the bulk of the alleged constitutional questions raised herein are worthy of this court's consideration, they should have been raised by appeal from the 1977 Court of Appeals decision and not from Appellee's attempt to bite the same apple twice by raising them in a case where the only real issue was the propriety of the penalty.

Based on the above, Appellees insist that this appeal be dismissed for the following additional reasons.

POINT II

This appeal is not timely in that it should have been made from the 1977

Court of Appeals decision which was final rather than from the current *sua sponte* dismissal.

POINT III

This judgment appealed from rests on an adequate non-federal basis, namely, the appropriateness of an administrative decision and the non-retroactive effect of legislated procedural changes. See *Groppi v. Wisconsin*, 400 US 502, 27 Ed.L 2d 571, 91 S.Ct. 490 (1970) to the effect that this court is bound to accept the interpretation of state law by the highest court of said state.

Appellee respectfully moves that this appeal be dismissed.

Dated: August 20, 1980

Respectfully submitted,

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APPENDIX A

N.Y.S. CONSTITUTION ART. 6, SEC. 3

§ 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

APPENDIX B

C.P.L.R. 5602

§ 5602. Appeals to the court of appeals by permission

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX C

C.P.L.R. 5601

§ 5601. Appeals to the court of appeals as of right

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

APPENDIX D

C.P.L.R. 5513(a)(b)& 5514(a)

§ 5513. Time to take appeal, cross-appeal or move for permission to appeal

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

§ 5514. Extension of time to take appeal or to move for permission to appeal

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

APPENDIX E

NEW YORK STATE COURT OF APPEALS RULE 500.2

Section 500.2 Filing and service of appellant's jurisdictional statement.

Within 10 days from the time the appeal is taken, appellant shall file with the clerk one copy of a statement giving the reasons for and the case, statutory, or other authority supporting the assertion that this court has jurisdiction to entertain the appeal and to review the questions raised. The statement shall recite (i) the title of the case, (ii) the court from which the appeal is taken, (iii) the date of service of the notice of appeal or the date of entry of the order granting leave to appeal, (iv) the date and type of service upon the appellant of the order or judgment appealed from and notice of entry thereof and (v) the name and address of the attorney for respondent. There shall be filed with the statement a legible copy of the dated notice of appeal, or the order, if any, granting leave to appeal, the order, judgment or determination appealed from, any other order brought up for review, the opinion or memorandum of the Appellate Division or other intermediate appellate court, the order, judgment or determination reviewed by the Appellate Division or other intermediate appellate court, and the formal or informal findings and conclusions upon which such order, judgment or determination was entered. Where a party will assert that a statute is unconstitutional, notice of this assertion shall be given to the Attorney General in writing at the time of filing this jurisdictional statement and a certification to such effect shall be included in this statement. An appeal shall not be deemed perfected until the filing of this statement and simultaneously with such filing appellant shall serve counsel for all parties with a full set of the papers required by this section. The court may determine, sua sponte, whether it has subject matter jurisdiction and power to review based on the papers submitted in accordance with this section.

APPENDIX F

Appellant's Jurisdictional Statement
to New York Court of Appeals

In the MATTER OF EUGENE F. CLAYTON, Petitioner-Appellant, against CENTRAL SCHOOL DISTRICT NO. OF THE TOWN OF CONKLIN, BINGHAMTON, KIRKWOOD and VESTAL, BROOME COUNTY, NEW YORK; and THE BOARD OF EDUCATION THEREOF, Respondents-Respondents. For Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

For his jurisdictional statement, pursuant to Section 500.2, Rules of the Court of Appeals, the petitioner-appellant hereby presents to the Court the following:

a) The title of the case is In the Matter of Eugene F. Clayton, Petitioner-Appellant against Central School District No. 1 of the Town of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York, and the Board of Education thereof, Respondent-Respondents, For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

b) The Court from which the appeal is taken is the Appellate Division, Third Department.

c) The date of service of the Notice of Appeal is February 14, 1980.

d) The date and type of service upon the appellant of the Order appealed from with notice of entry thereof is service by mail on January 17, 1980.

e) The name and address of the attorney for respondent is Frank C. Shaw, Esq.,

Shaw, Esworthy, O'Brien & Crowley,
123 Front Street, Binghamton, New York,
13905.

Filed herewith are the following attachments:

i) The Notice of Appeal, dated February 14, 1980;

ii) The Order of the Appellate Division, Third Department, being appealed from, dated January 8, 1980;

iii) The written Decision of the Appellate Division, Third Department, dated December 27, 1979;

iv) The Record before the Appellate Division, Third Department;

v) Certification that the Attorney General of the State of New York has been notified in writing that the application of Education Law 3020-a to the petitioner is being claimed to be unconstitutional.

A statement why this Court has jurisdiction to entertain the appeal and to review the questions asked follows:

This is an Article 78 proceeding to review the determination of the respondent Board of Education of May 19, 1977; which determination was made pursuant to Education Law 3020-a with respect to the disciplining of a tenured teacher. The Board of Education dismissed the petitioner, "effective as of the last day that he was paid salary by the District . . ."

The petitioner was a full-time, tenured employee of a public school system at the time of his suspension. Hence he has property and liberty rights in his employment; and if he has been terminated

unjustly or in a manner which is repugnant to due process, his Constitutional rights have been abridged.

The Constitutional questions posed in this litigation are as follows.

First, at the time the charges against the petitioner were originally brought (February, 1974), Education Law 3020-a provided, in part, that: "Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed." One of the charges made against the petitioner related to an incident which had occurred almost four and one-half years before. However, Section 2573 of the Education Law provided that teachers in city school districts could not be charged with alleged misconduct dating back more than three years. Hence, the Education Law made a distinction between teachers in city school districts and teachers in non-city school districts with respect to the time limitations applicable for 3020-a charges. Such a distinction has no basis in law; it is an irrational, arbitrary, and capricious classification. As such, the application of the statute in such a way as to allow the School District to bring charges against this teacher for alleged misconduct so old that no such charges could have been brought against a city school teacher under the same circumstances consitutes a denial of substantive due process and a denial of equal protection under the laws of this State and of the United States.

Second, at the time the determination was made by the Board of Education on May 19, 1977, Education Law 3020-a had been amended, effective April 15, 1977, or more than a month prior to the Board's determination. One of the amendments had the impact of changing from five years to "three years after the occurrence of the alleged imcompetency or misconduct" the limitation barring charges being brought against a tenured teacher. Despite this, the Board of Education considered a charge which was brought approximately four and a half years after it had occurred; apparently by rationalizing that it was not required to follow the dictates of the statute as it then existed, but rather the statute as it existed at the time the charges were originally brought. Hence, in May, 1977, punishment was assigned against the petitioner on the basis of a charge which the statute--as it then existed--prohibited any School District from taking into consideration. As such, the petitioner was punished in a way different from all other teachers who might have charges preferred against them; and this differentiation is a violation of due process and a denial of equal protection under the laws of the State and the United States.

Third, Education Law 3020-a was amended, effective April 15, 1977, in another highly significant way. The amendments made the findings of the tenure hearing panel mandatory upon the Board of Education, rather than advisory, as they had been up to that point in time. The tenure hearing panel in this case ad-

vised that the charges against the petitioner be dropped and that there be no assessment of punishment of any sort. The panel specifically found that there was a lack of substantial evidence against the petitioner and advised his immediate reinstatement. The Board of Education ignored the findings of the tenure hearing panel and terminated the petitioner; apparently on the theory that it was not bound by the statute as it then stook, but rather by the statute at the time the charges were brought. Hence, when it disregarded the tenure hearing panel's conclusions, it dealt with the petitioner in a manner different from the manner in which all other tenured teachers must be treated, as of April 15, 1977. This differentiation and application of the old statute thus constitutes a denial of due process and a denial of equal protection under the laws of this State and the United States.

Fourth, one of the charges against the petitioner is that he was insubordinate and guilty of conduct unbecoming of a teacher by virtue of the fact that he wrote a letter to the editor which disagreed with the conclusions of a previously published letter to the editor by the Vice President of the School Board. The bringing of any such charge is a crude attempt to abridge the petitioner's freedom of speech; and since the charge was utilized throughout the proceeding, the petitioner's First Amendment rights have been violated. Pickering v. Board of Education, 391 U.S. 563; Matter of Puentes v. Board of Education, 24 NY2d 996.

Fifth, the entire process involved a denial of the petitioner's right to due process of law and was done in bad faith. The Vice President of the Board of Education wrote a letter to the editor, alleging that children were being abused in the School District by teachers. The petitioner responded with a letter of his own, in which he argued that the greater problem was abuse of teachers by students. Apparently stung by this public disagreement, the Vice President of the Board, Gordon Pratt, then studied personnel records of the petitioner. Mr. Pratt then directed that an "incident" report be filed with respect to a very minor matter between a student and Mr. Clayton. Mr. Pratt then used an incident which had occurred about four and a half years previous, along with the new, manufactured incident, and the letter to the editor as the bases for charges which he himself offered to the Board of Education. Mr. Pratt then sat on the Board of Education as it decided there was "probable cause" to bring charges against the petitioner; and later he voted with the Board to terminate the petitioner. Through this entire process, then, the Vice President of the Board of Education served as investigator, prosecutor, judge and jury of the petitioner. He was determined that Mr. Clayton be discharged from the District irrespective of the facts, and irrespective of equity or fairness. In such an atmosphere, the petitioner was not given a fair opportunity to rebut the charges and clear his name. On the one occasion when an objective, dispassionate body did review the evidence (the tenure hearing panel), it unanimously rejected

the charges and urged immediate reinstatement. Mr. Pratt's vigorous "investigation" of the petitioner's personnel record and his prosecution of the petitioner before the Board coming, as it did, after being publicly criticized by the petitioner suggests a "probability of actual bias that it is too high to be constitutionally tolerated". Withrow v. Larkin, 421 U.S. 35, 47. The participation of Mr. Pratt in the decision to terminate the petitioner tainted the process with actual bias or at least the probability of actual bias. Accordingly, the petitioner's right to due process of law has been abridged. Mayberry v. Pennsylvania, 400 U.S. 455; Taylor v. Hayes, 418 U.S. 488; cf. Amos v. Board of Education, 54 AD 2d 297, aff'd. 43 NY 2d 706; Matter of Root v. Board of Education, 59 AD 2d 328.

Dated February 22, 1980.

Respectfully submitted,

PAUL E. KLEIN, ESQ.
ASWAD & INGRAHAM, of Counsel
Attorneys for Petitioner-Appellant
Office and P. O. Address
106 Oak Street
Binghamton, New York, 13905
Tel.: (607) 722-3495

APPENDIX G
Letter from Court Clerk

STATE OF NEW YORK
COURT OF APPEALS

Joseph W. Bellacosa
Clerk of the Court

Clerks Office
Albany 12207

February 26, 1980

Charles O. Ingraham, Esq.
Aswad & Ingraham
106 Oak Street
Binghamton, New York 13905

Re: Clayton v. Central School District No. 1 of Town of Conklin

Dear Mr. Ingraham:

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte with respect to whether a substantial constitutional question is directly involved in the appeal (CPLR 5601 (b)(1)). It appears that the determination below may have rested on alternative and non-constitutional grounds (see generally Cohen and Karger, Powers of the New York Court of Appeals, Ch. 7; specifically Section 57, Section 59).

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Very truly yours,

s/Joseph W. Bellacosa

Joseph W. Bellacosa

DMS/cpw

cc: Frank C. Shaw, Esq.

APPENDIX H
Appellant's letter re constitutional jurisdiction

ASWAD & INGRAHAM
Attorneys-At-Law
106 Oak Street
Binghamton, New York 13905

Richard N. Aswad Area Code 607
Charles O. Ingraham
Joseph B. Meagher 722-3495

March 7, 1980

State of New York
Court of Appeals
Clerk's Office
Albany, New York 12207

Att: Joseph W. Bellacosa

Re: Clayton vs. Central School District No. 1 of Town of Conklin

Dear Mr. Bellacosa:

This statement is in response to your letter of February 26, 1980, in which you invite us to present any supplemental comments in justification of the Court retaining subject matter jurisdiction in the above-captioned case.

The Appellant appeals to this Court as of right pursuant to Civil Practice Law and Rules Section 5601(b)(1)

from an Order of the Appellate Division, Third Department dated January 8, 1980. By that Order, the Appellate Division affirmed the Appellant's dismissal from employment as a tenured secondary school teacher. In a written decision dated December 27, 1979, the Appellate Division ruled that the penalty of dismissal was not excessive and that there was substantial evidence to support the school board's determinations with respect to its charges against the Appellant.

In the Petition by the Appellant and in the brief presented to the Appellate Division, it was alleged and argued that the school board's determination violated the Appellant's constitutional rights by virtue of the manner in which the determination was made and the factors upon which the determination was based. Specifically, the school board dealt with the Appellant in a manner that was distinct from that in which similarly situated persons were being treated at the time, in violation of the Appellant's right to equal protection of the law. Further, the school board considered in its decision to dismiss the Appellant, the fact that he had written a letter to the editor of a local newspaper criticizing the conclusions of a prior letter written by the vice president of the school board. Such a consideration is in violation of the First Amendment. Finally, the school board vice president's pervasive participation in the investigation, prosecution, and determination of the charges against the Appellant deprived the Appellant of a

fair and impartial hearing in violation of his right to due process.

The Appellate Division did not address these arguments expressly in its decision to affirm the Appellant's dismisal. However, that Court's silence on the issues is immaterial. (Tang vs. Appellate Division, 487 Fd2 138, 141, n. 2 (2d Cir 1974)). The Appellant contends that the process by which he was terminated violated several constitutional rights, and success on any one of those arguments would have required reversal of the termination. Even if the Appellate Division correctly found that the Appellant's termination was supported by substantial evidence and that that penalty was not excessive, reversal would nevertheless be in order had that Court agreed that the school board had unlawfully discriminated against the Appellant, or considered constitutionally impermissible factors in reaching its determination, or deprived the Appellant of a fair and impartial hearing. Thus, notwithstanding its ability to find substantial evidence for the school board's determination and penalty, the Appellate Division could not have reached the decision it did without necessarily considering and rejecting the Appellant's constitutional claims. (See, Winters vs. Lavine, 574 F2d 46, 60 (2d Cir 1978)).

The Appellant now seeks review of the Appellate Division's Order pursuant

to Civil Practice Law and Rules Section 5601(b)(1). The constitutional claims outlined above were explicitly made to the Appellatte Division in the Appellant's Petition and brief below. Moreover, the non-constitutional grounds upon which the Appellate Division based its decision were not alternative to these claims, since a favorable ruling on any one of the Appellant's constitutional claims would have required that his dismissal be reversed. Accordingly, the Appellate Division's decision finally determined an action which directly involved the construction of the United States Constitution. The Appellant, contending that that construction is erroneous, is entitled to appeal to this Court as of right pursuant to Civil Practice Law and Rules Section 5601(b)(1).

Respectfully submitted,

Charles O. Ingraham

COI:jw
cc: Frank C. Shaw, Esq.

APPENDIX I
Appellee's objections to jurisdiction

SHAW, ESWORTHY, O'BRIEN & CROWLEY
Attorneys-At-Law
123 Front Street - Binghamton, N.Y.
13905

March 3, 1980

Hon. Joseph W. Bellacosa
Clerk of Court
Court of Appeals
Eagle & Pine Streets
Albany, New York, 12207

Re: Clayton v. Central School District
No. 1. of Towns of Conklin, etc.
Susquehanna Valley Central Schools

Dear Mr. Bellacosa:

This letter is submitted pursuant to your letter to Charles O. Ingraham, as attorney for the petitioner Clayton, dated February 26. I understand a letter is the type of writing expected.

All of the alleged "constitutional questions" raised in the jurisdictional statement have been before this court previously in an earlier case involving the same matter. *Matter of Eugene F. Clayton, petitioner, vs. BOE of Central School District No. 1 of Conklin, et al,* 41 NY 2d 966, 394 NYS 2d 882 (3) and the companion case argued together *Elmer Hodgkins, petitioner, vs. same,* 41 NY 2d 962, 394 NYS 2d 822 (2).

I quote the titles to certain points in petitioner's brief in the above case:

> "Point III The multiple roles assumed by the appellant and its agents in this tenure hearing deprives respondent of his rights under the due process clause of the Fourteenth Amendment."

> "Point IV The appellant's decision to make respondent's dismissal retroactive to the date of suspension is an unlawful attempt to circumvent the court of appeals decision in Matter of Jerry."

> "Point V Education Law 3020-a is unconstitutional and its unconstitutional infirmities are not rectified by subsequent amendment of the rules and regulations of the New York State Department of Education."

My reply briefs in the same case covered the following points: (To avoid repetition, these points were set forth only in my reply brief in the *Hodgkins* case.)

> "POINT VIII - The role of Mr. Pratt was lawful and proper; the "rule of necessity" is valid in this case."

> "POINT XI - Constitutional considerations."

In addition, all or most of the same alleged "Constitutional issues" were raised and briefed in this case in special term, (Zeller, J.) and before the Appellate Division (Mahoney, P.J., Greenblott, Main, Mikoll and Herlihy, J.J.). Neither court found the issues to be constitutional questions.

I quote from Table of Contents of petitioner's brief to the Appellate Division in this case:

> "Point I. The Board's determination on the charges was unlawful and irregular and should be stricken as a matter of law."
>
> "A. The Board violated Education Law 3020-a, as amended in 1977."
>
> "1. The amendments of Education Law 3020-a, effective April 15, 1977, were binding upon the Board in its May 19, 1977 determination."
>
> "2. The Board's determination is contrary to the dictates of Education Law 3020-a, as amended."
>
> "3. The statutory changes reflected in the amendments to Education Law 3020-a reflect public policy and thus Board's action violates public policy and should be annulled."

"B. Even if Education Law 3020-a, as it stood prior to April 15, 1977, was applicable, the Board's action did not conform to the requirements of the statute."

Point III. The determination of the Board violated the petitioner's right to due process of law and also was done in bad faith."

Not only have most of these same issues been before the Court of Appeals once, they have been before the Appellate Division three times. (1) The recent occasion from which this appeal is sought; (2) the 1976-77 case as to which this court reversed; and (3) a prior case by petitioner and another challenging the amendments made by the Commissioner of Education to the rules governing cases under Ed.L. 3020-a as required to meet the strictures of the federal case, *Kinsella v. BOE CSD No. 7 of the Towns of Amherst and Tonawanda, Erie and Ewald B. Nyquist, Commissioner of Education,* 378 Fed. Supp. 54. See *Hodgkins, et al v. CSD No. 1, Towns of Conklin, etc.* 48 AD 2d 302, 368 NYS 2d 891.

The only new issue is the question of whether the later amendments to E.L. 3020-a should be given retroactive effect. Special Term held they should not and the Appellate Division affirmed. Retroactive application of a statute is

hardly a new frontier of the law. This court has already ruled that the 1977 amendments to Ed.L. 3020-a procedure are not to be applied retroactively when a case has progressed to a stage very similar to that in this case *BOE Lisbon CSD*, 47 NY 2d 279, 418 NYS 2d 291. A similar result was reached earlier by the Second Department in *Melfi v. BOE CSD No. 1 of the Town of Rhinebeck*, 64 AD 2d 631, 406 NYS 2d 874 citing *Lazarus v. Met. El. R. Co.*, 145 NY 2d 581.

For the above reasons, respondent respectfully urges that the proposed appeal be rejected.

Thank you.

Respectfully submitted,

SHAW, ESWORTHY, O'BRIEN
& CROWLEY

Frank C. Shaw

FCS:df
cc - Charles O. Ingraham, Esq.
Aswad & Ingraham

APPENDIX J

CHARGES AND SPECIFICATIONS AGAINST APPELLANT

CHARGE I

You have unwarrantedly used excessive physical force on students of this District in spite of warnings and specific directions from your superiors not to do so.

SPECIFICATION NO. 1

At all times hereinafter mentioned, the District policy on corporal punishment provided in part as follows: ". . . corporal punishment must be reasonable in manner and moderate in degree."

SPECIFICATION NO. 2

By copy to you of a letter from Mr. Stank, your building principal, to Mr. Donnelly, the Superintendent of Schools, dated January 23, 1967, you were advised in writing not to hit in any way, any students. You were further warned that if you did hit any student, it would be viewed as insubordination.

SPECIFICATION NO. 3

On October 21, 1969, you disobeyed the above specific instructions by slapping a student by the name of Henry Hawley; by grabbing said student in such a way that he fell to the floor whereupon you struck him on the shoulder and back area causing bruises on the student's back.

SPECIFICATION NO. 4

As the result of the above incident, (Specification No. 2) you were again instructed by your building Principal, Mr. Stank, not to hit any more students in the future; to send disruptive students to the Guidance Office as a first step measure and you were told that you were not to strike any students.

SPECIFICATION NO. 5

By copy of letter from Mr. Stank, your Junior High Principal, to Dr. Gerhard, Superintendent of Schools, dated October 9, 1973, you were told that you are not to physically discipline students.

SPECIFICATION NO. 6

In spite of the above warnings, the most recent being that referred to in Specification 4 above,

you did on December 10, 1973 grab the arm of Bryan Nick after chasing him for at least forty feet down the "commons" toward the Guidance Office. At that time you started to pull the student back and around by an arm hold but were prevented from further physical actions by the intervention of Mr. Gaffney.

CHARGE II

You have repeatedly committed acts of insubordination.

SPECIFICATION NO. 1

Specifications Nos. 1 through 6 as to Charge I are hereby reiterated and repeated in substantiation of the above Charge II as Specifications 1 - 6 hereof.

SPECIFICATION NO. 7

By letter of October 27, 1969, from your building Principal, to Mr. Donnelly, the Superintendent of Schools, you were instructed to prepare permanent lesson plans for a substitute. In a conference on April 18, 1973, you admitted to Mr. Stank that you had not done lesson plans for three years.

SPECIFICATION NO. 8

On or about November 29, 1973, the Evening Press, a newspaper published in Broome County and circulated in the general area of this School District, contained a Letter to the Editor written by you in which you stated that "many unfortunate, misguided pupils are abusing the teachers!" No wrong doing is imputed or charged against you as to the writing and publishing of this letter but by letter to you from the Superintendent of Schools dated December 7,1973, you were asked to supply the Superintendent with specific information in regard to the time, location, individuals involved in teacher abuse together with any other specific information which bears upon the details of such alleged abuse. You were advised in this letter that the Superintendent wished the information in the very near future. By letter dated January 10, 1974 from the Superintendent, you were advised that because you had not furnished the specific information requested, the Superintendent was concluding that your remarks were irresponsible and for the purpose of inflaming . . . discussion . . .

CHARGE III

You have engaged in conduct which is unbecoming a teacher.

SPECIFICATION NO. 1

Specifications Nos. 1 through 6 as to Charge I above, are hereby reiterated in full in substantiation to Charge III.

Specification 7 to Charge II is hereby reiterated in substantiation of Charge III as Specification 7 (Charge III).

Specification 8 to Charge II is hereby repeated and reiterated as Specification 8 hereof.

APPENDIX K

STATUTORY GROUNDS FOR DISMISSAL OF TENURED TEACHERS

Art. 61 TEACHERS; ADMINISTRATION § 3012

2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period.

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 79-2041

EUGENE F. CLAYTON, Appellant

-vs-

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF, Appellees.

STATE OF NEW YORK)
: ss:
COUNTY OF BROOME)

FRANK C. SHAW, being duly sworn, deposes and says that he is a member of the Bar of this court representing the Appellees herein.

That on August 25, 1980, deponent served the within motion to dismiss with supporting papers on Paul E. Klein, Aswad and Ingraham, of counsel, as attorneys for the Appellant in this action at 46 Front Street, Binghamton, New York, 13905, the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office box under the exclusive care and custody of the United States Post

Office Department within the State of New York.

Frank C. Shaw

Sworn to and subscribed
before me this 25th day
of August, 1980.

Ellen M. Browne
Notary Public

ELLEN M. BROWNE
Notary Public, State of New York
Residing in Broome County
Commission expires March 30 1982